United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers *and* Chauffeurs, Teamsters and Helpers "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 30-CA-4253, 30-CA-4264, 30-CA-4437, and 30-CA-4485

February 12, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 9, 1979, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding[1] finding, *inter alia*, that Respondents had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily laying off employees Guy Bourdo, Milan Mix, and Percy Williams. The Board ordered that they be reinstated and made whole for any loss of earnings suffered by reason of the discrimination against them. On July 30, 1980, the United States Court of Appeals for the Seventh Circuit issued its judgment[2] enforcing the Board's Order.

Thereafter, the Regional Director for Region 30 issued and served on the parties a backpay specification and notice of hearing on December 9, 1980. Respondents filed an answer on January 12, 1981,[3] in which they denied the allegations of the specification. On January 13, and March 18 and 19, a hearing was held before Administrative Law Judge Irwin H. Socoloff for the purpose of determining the amounts of money due under the backpay specification.[4] On June 30, Administrative Law Judge Socoloff issued the attached Supplemental Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[5] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers, Menomonee Falls, Wisconsin, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] 244 NLRB 72.

[2] 631 F.2d 735.

[3] All dates are in 1981 unless otherwise indicated.

[4] The cases herein were consolidated for purposes of hearing with Case 30-CA-2885, which involved the same parties.

[5] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: On August 9, 1979, the Board issued its Decision and Order (244 NLRB 72) directing Respondent, *inter alia*, to take certain affirmative action to remedy the unfair labor practices therein found, including the reinstatement of certain individuals and payment to them of backpay. Thereafter, on July 30, 1980, the Court of Appeals for the Seventh Circuit entered its judgment enforcing the Board's Order (631 F.2d 735). The present controversy concerns the amount of backpay due to discriminatorily discharged truckdrivers Milan Mix, Guy Bourdo, and Percy Williams, and the amounts required to be paid on their behalf to contractually established fringe benefit funds, under the terms of the Order.

Pursuant to notice, hearing in this matter[1] was held before me in Milwaukee, Wisconsin, on January 13 and March 18 and 19, 1981, at which the General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

The backpay specification seeks recovery of lost wages and fringe benefit contributions for Bourdo and Williams, covering the period June 27 to July 26, 1977, and wages and contributions for Mix, Bourdo, and Williams, covering the period November 11, 1977, until the respective dates of reinstatement of those discriminatees; namely, January 14, 1978, April 15, 1978, and April 8,

[1] These cases were consolidated for purposes of hearing, only, with Case 30-CA-2885, involving the same parties.

1978. For the first layoff period backpay awards are sought covering the entire period based on the average weekly earnings of the discriminatees during the weeks preceding the unlawful layoffs. For the second period, the specification seeks backpay based on the hours actually worked by replacement drivers, as reflected in JMCO payroll records.

The method of computation for the second layoff period, as contained in the specification, takes into account the irregular and/or seasonal nature of Respondent's business, as found by the court of appeals in a prior backpay case involving the same discriminatees. The specification thus limits backpay sought to the earnings of the replacement drivers, DuQuaine, Schlei, and Watson, which are assigned to the discriminatees on the basis of seniority. Respondent agrees that hours worked by replacement drivers constitute the proper measure of backpay, but contends, nonetheless, that the hours worked as truckdrivers by nonunit employees DuQuaine (a mechanic), Schlei (a machine operator), and Watson (a cement finisher) are not properly assigned to the discriminatees. Thus, Respondent argues that for layoff purposes it, historically, has maintained a companywide seniority system under which, even absent the discrimination, it would have assigned truckdriving work for this period to the senior nonunit employees while laying off the more junior bargaining unit employees. For the reasons stated in my second supplemental decision in *United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers*, Case 30-CA-2885 (JD-309-81, June 24, 1981), this contention is rejected. I conclude that the specification sets forth an appropriate measure of backpay for the second layoff period.[2]

With respect to the first layoff period, JMCO payroll records do not reflect payments to replacement drivers for work performed during that time frame. However, in the underlying unfair labor practice case, the Board, with court approval, found that, during that period, while Bourdo and Williams were on layoff status, Respondent's trucks were driven by nonbargaining unit employees Watson and Welda, as well as by Mix. Moreover, Respondent's president, James Mews, testified at the instant backpay hearing that employees who engaged in truckdriving work may have been paid under an account of United Contractors (the road construction entity) rather than an account of JMCO (the trucking services entity). While the United Contractors payroll records are in evidence, they do not delineate the nature of the work for which wages were paid. In these circumstances, the General Counsel argues that, "without payroll records indicating earnings for replacement drivers, it must be presumed, absent specific contrary evidence supplied by Respondent, that Bourdo and Williams would have worked as many hours on a weekly basis in June, 1977, as they averaged for the period prior to their layoffs." Further, the General Counsel urges, "the June, 1977, layoffs, are not subject to Respondent's claim that an average weekly wage method of backpay computation fails to account for the seasonal nature of its operations," particularly in light of the Board's findings, approved by the Court, that the layoffs were not caused by the occurrence of slack periods.

While it is true that the June-July 1977 layoff period did not occur at a time when Respondent's business normally suffers from seasonal slowdowns, there is uncontradicted record evidence that the work of the business is irregular and subject to occasional slack periods even during the normally busy summer months. Nonetheless, in light of the earlier findings of the Board and the court in this case, that the layoffs were not caused by such slack periods, and that, during the layoff periods, the work of the discriminatees was performed by nonunit employees, I agree with the General Counsel that the "average wage" method of computing backpay must be deemed appropriate in the absence of reliable evidence to the contrary. As Respondent has not presented reliable evidence of replacement driver earnings during the first layoff period, or otherwise shown that the General Counsel's backpay formula is inappropriate, I conclude that the specification sets forth an appropriate measure of backpay for the first layoff period.[3]

Upon the foregoing findings, conclusions, and upon the entire record in this case, I hereby issue the following recommended:

ORDER[4]

The Respondents, United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers, Menomonee Falls, Wisconsin, their officers, agents, successors, and assigns, shall make Milan Mix, Guy Bourdo, and Percy Williams whole by payments to them in the amounts set forth below, together with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel*

[2] In its brief, Respondent appears to argue that the number of hours spent doing truckdriving work by replacement drivers may be best ascertained not from the payroll records of JMCO, Respondent's trucking services entity, but from a compilation of "dumpsite slips" signed by drivers who hauled loads, during relevant periods, to one particular "dumpsite." However, the record evidence reflects that drivers do not always sign such a slip when hauling a load to that particular site. Moreover, JMCO's president, Mews, conceded in his testimony that, during relevant periods, loads were, or may have been, driven to other dumpsites. In addition, the record evidence does not show that the hauling loads to "dumpsites" was the only type, or even the primary type of truckdriving work performed during the layoff periods. For these reasons, I do not view the compilation of "dumpsite" slips as a reliable indicator of the truckdriving work performed during the layoff periods.

[3] Respondent contends that, after the May 31, 1977, expiration of its collective-bargaining contract with the Charging Party, the fringe benefit funds refused to accept tendered contributions, apparently because of the absence of a contract. However, the record evidence does not establish that such payments were, in fact, tendered. In any event in its Decision herein enforced by the court the Board found, *inter alia*, that Respondent had failed to bargain in good faith with respect to the terms of a successor agreement, and had unlawfully made unilateral changes in wages and working conditions. Respondent was ordered to honor and enforce the provisions of the expired contract, until a new agreement is reached, and to restore all benefits established pursuant to the contract. As part of that obligation, Respondent must tender contributions, per the contract, to the health and welfare and pension funds, in accordance with the backpay specification, for all entitlement weeks in the backpay periods.

[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all pruposes.

Corporation, 231 NLRB 651 (1977),[5] less tax withholding required by Federal and state laws:

Milan Mix	$2,295.15
Guy Bourdo	6,839.09
Percy Williams	2,514.57

Respondents shall make payments, on behalf of Milan Mix, Guy Bourdo, and Percy Williams to the Milwaukee Area Truck Drivers Health and Welfare Fund, and the Central States, Southeast, and Southwest Areas Pension Fund, at the applicable contract rates, for those weeks during the backpay periods in which work was available for the discriminatees, as set forth in the specification, and found, above, plus lawful interest accrued to the date of payment.

[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: On September 19, 1975, the Board issued a Decision and Order in the above-entitled proceeding (220 NLRB), directing Respondent, *inter alia*, to take certain affirmative action to remedy the unfair labor practices therein found, including the reinstatement of certain individuals and payment to them of backpay. Thereafter, on June 23, 1976, the Court of Appeals for the Seventh Circuit issued its judgment enforcing the Board's Order (539 F.2d 713, cert. denied 429 U.S. 1061). Subsequently, a controversy arose concerning the amount of backpay due to discriminatorily discharged truckdrivers Milan Mix, Guy Bourdo, and Percy Williams, and the amounts required to be paid on their behalf to contractually established fringe benefit funds, under the terms of that Order. Accordingly, a supplemental hearing was held before me on September 12, 1977, in order to resolve those issues and, thereafter, I issued my Decision recommending that Respondent be ordered to make certain payments to Mix, Bourdo, and Williams, and to the fringe benefit funds. On September 29, 1978, the Board issued a Supplemental Decision and Order (238 NLRB 893) adopting that recommended Order which, in essence, awarded backpay to the discriminatees for the entire backpay period.

On February 1, 1980, the Court of Appeals for the Seventh Circuit declined to enforce the Board's Supplemental Order, holding that "the administrative law judge and the Board ignored uncontradicted evidence that the Board's backpay formula was inapplicable in this case" in that "economic factors may have prevented the discharged employees from working at JMCO during part of the layoff period" 614 F.2d 134. The court, noting evidence that work at JMCO was irregular and/or seasonal, and that "during slack periods driving was assigned to available employees according to seniority, regardless of whether the worker usually drove a truck," remanded the case to the Board for a new hearing, concluding:

> An employer may, without incurring back pay liability, refrain from reinstating a discriminatorily discharged employee during a period when employment would not have been available for him even absent the discrimination. . . . The extent to which work at JMCO was seasonal is unclear. There is no doubt, however, that the work was irregular and that during slack periods newer employees were laid off. We remand this case to the Board for a new hearing on the company's contention that these factors justify a reduction of the back pay award.

On July 10, 1980, the Board accepted the court's remand and ordered that the record be reopened to allow the parties to introduce evidence on the remanded issue. Thereafter, the General Counsel moved to amend the backpay specification. That motion is hereby granted.

Pursuant to notice, hearing in this matter[1] was held before me in Milwaukee, Wisconsin, on January 13, and March 18 and 19, 1981, at which the General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

In its initial backpay specification, as amended on September 2, 1977, the General Counsel sought backpay awards for Mix, Bourdo, and Williams, covering the entire backpay period, based on the average weekly earnings of those discriminatees during the months preceding and following the layoffs. Subsequent to the decision of the court, the General Counsel, as noted, amended its specification. The amended specification is predicated upon the irregular and/or seasonal nature of Respondent's business, as found by the court, and seeks backpay, and fringe benefits contributions, based on the hours actually worked by replacement drivers during the backpay period, as reflected in JMCO payroll records.[2] Accordingly, the amended specification assigns the earnings of the replacement drivers, Van Roosenbeek, Franz, DuQuaine, Welda, and Watson, to the discriminatees on the basis of seniority. Under this method of computation there were no weeks during the backpay period in which work was available for Williams and, consequently, backpay is not sought for him.[3]

At this juncture, the issue to be resolved is a narrow one. Respondent concedes that the amended specification properly assigns to the discriminatees, for backpay computation purposes, the hours worked by Van Roosenbeek, Franz, and Welda during the layoff period. Thus,

[1] This case was consolidated, for purposes of hearing, only, with Cases 30-CA-4253, 4264, 4437, and 4485, involving the same parties.

[2] The revised specification takes into account that period in early 1975 when Bourdo, due to illness, was unavailable for work.

[3] Likewise, the amended specification does not seek fringe benefit contributions for Williams for the layoff period but, rather, only for that period, prior to the layoffs, during which Respondent unlawfully refused to make fringe benefit contributions.

Van Roosenbeek and Franz were hired as replacement drivers following the unlawful layoffs. Welda, a nonbargaining unit employee, has less companywide seniority than Mix or Bourdo. However, Respondent contends that hours worked by the other nonunit employees, DuQuaine and Watson, are not properly assigned to the discriminatees since both DuQuaine and Watson have more companywide seniority than either Mix or Bourdo. This argument is premised on Respondent's claim that, for layoff purposes, it, historically, followed a companywide seniority plan under which, during slack periods, it would assign truckdriving work to senior nonunit employees, able to perform the job, while laying off more junior unit employees.

In its unpublished decision issued on July 30, 1980, 631 F.2d 735, the Court of Appeals for the Seventh Circuit, in a case involving the same parties, rejected this very contention. There, the court, in enforcing a Board Order (244 NLRB 72) which sought, *inter alia*, to remedy the subsequent illegal layoffs of Mix, Bourdo, and Williams, dismissed Respondent's argument that the layoffs were "caused by a lack of sufficient work and in accordance with a companywide seniority plan," holding:

> The timing of the layoffs and other testimony in the record supports the Board's inference of the illicit cause of the layoffs, and the employers' contention that the layoffs were caused by a lack of work and in accordance with the seniority plan is significantly undercut by testimony that during the period the bargaining unit employees were laid off, their trucks were driven by non-bargaining unit employees, at least one of whom had less seniority than Bourdo did. The employers' suggested interpretation of their seniority plan, one that would justify these layoffs,[7] is lacking sufficient evidentiary support in the record and would contravene a provision in the collective bargaining agreement between the parties that expired in May 1977.[8] In these circumstances, we believe the Board's inference of an anti-Union animus behind the layoffs is justified and supported by substantial evidence.
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> This court's prior decision in *N.L.R.B.* v. *United Contractors, Inc. and JMCO Trucking, Inc.* (No. 78-2609, 7th Cir. 1980) is not inconsistent with this determination. In that case, this court had before it the Board's back-pay computation that required the employers to pay for the entire period of the prior illegal layoffs of Bourdo, Williams, and Mix. The computation was based upon the average weekly hours employees had worked in the months preceding and following the layoffs, and the employers complained that this computation failed to take into account the "seasonal variation" in the employers' business that would have resulted in a decrease in the hours the employees actually would have worked in the layoff period. This court agreed with the employers' argument and held that the Board's computation should have taken into account the evidence of these slack periods. That holding is irrelevant to the present issue, however, for we do not interpret the Board's argument here to be that such slack periods did not exist, but rather that the present layoffs were not caused by the occurrence of these periods and were not in accordance with the actual seniority plan.

[7] Mr. Mews, JMCO president, testified that his interpretation of the seniority plan was that:

> A man with one skill can have less seniority than someone else with less time on the job, if the person with less time on the job has a higher level of skill.

[8] The provision read as follows:

> The Employer. . . shall not direct or require its employees or persons other than the employees in the bargaining units here involved to perform work which is recognized as the work of the employees in said units. . . .

The Board's order required the Company to honor and enforce the collective bargining agreement expiring in 1977 "until a new agreement is reached."

The contract provision cited by the court has been in effect at all times material hereto. The clause, in full, provides:

> Work Assignments: The Employer hereby assigns all work involved in the operation of the Employer's truck equipment during the operation, loading and unloading thereof to the employees in the bargaining unit here involved. The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require its employees or persons other than the employees in the bargaining units here involved, to perform work which is recognized as the work of the employees in said units. This is not to interfere with bona fide unions.

While there is record evidence that, in the years preceding the unlawful layoffs of 1974, truckdriving work was, at least occasionally, performed by nonunit employees,[4] there is a lack of evidence demonstrating that that occurred during periods when unit employees were on layoff status, President Mews' testimony that Respondent has, historically, followed a companywide seniority plan, at least for layoff purposes, has not been supported by credible evidence showing that such a practice was in effect prior to the discriminatory layoff period.

Employee Frank Watson, a cement finisher, and Respondent's most senior employee on a companywide basis, testified that Respondent has, indeed, for layoff purposes, maintained a companywide seniority system. Watson, a qualified truckdriver, conceded that, in the years preceding the discriminatory layoffs of 1974, he was laid off during the winter periods while Mix and

[4] Respondent's president, James Mews, testified that, by its inaction, the Union had acquiesced in a practice, contrary to the cited contractual provision, of assigning driving work to nonunit employees. However, there is no evidence that the Union became aware of such a practice prior to the Board hearings in the instant matter which commenced early in 1975. On cross-examination, Mews conceded that, since that time, the Union has consistently protested the making of such assignments. At one point during his testimony, Mews appeared to deny the existence of a driver's unit, contending that "everybody in our company does everything, so everybody is in every unit." This answer was in conflict with Mews' response to a March 28, 1980, interrogatory, in which he stated that Mix, Bourdo, and Williams were the only employees in the drivers' unit.

Bourdo, with less companywide seniority, continued to drive. However, according to Watson, this occurred because he would request a layoff each year in order to allow the unit drivers to continue to work.[5]

I found Watson to be a vague, argumentative, hostile, and evasive witness and, accordingly, I have accorded little weight to his testimony, particularly in light of certain credited uncontradicted testimony of Bourdo.

Thus, Bourdo testified that in the 1970 to 1974 period during the fall and winter months while Watson was on layoff status, he, Watson, would visit the jobsites and tell Mix and Bourdo: "You guys really got it good. I'm laid off and you guys are working." Such statements by Watson belie his claim that his layoff status was of a voluntary nature.

Respondent has again failed to demonstrate the existence of a companywide seniority plan under which, even absent the discrimination, Mix and Bourdo would have been laid off during the backpay period while nonunit personnel performed the customary work of those employees, that is, truckdriving. In reaching this conclusion, I rely on the factors set forth by the Court of Appeals for the Seventh Circuit in its July 30, 1980, opinion; Respondent's practice, prior to the discriminatory period, of laying off during slack periods its most senior employee, Watson, a qualified truckdriver, while retaining the services of unit employees with less companywide seniority; Respondent's use of Welda, during the 1974–75 backpay period, as a truckdriver, despite the fact that he enjoyed less companywide seniority than either Mix or Bourdo. I conclude that the amended specification seeking backpay based on the hours actually worked by replacement drivers sets forth an appropriate measure of backpay.

[5] In 1974, Watson was recalled from layoff status for a period of 2 weeks to drive a truck, at a time when Bourdo was ill and unavailable for work.

Upon the foregoing findings, conclusions, and upon the entire record in this case, I hereby issue the following recommended:

ORDER[6]

The Respondents, United Contractors Incorporated and JMCO Trucking Incorporated, Joint Employers, Menomonee Falls, Wisconsin, their officers, agents, successors, and assigns, shall make Milan Mix and Guy Bourdo whole by payments to them in the amounts set forth below, together with 6 percent interest thereon to be computed in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), less tax withholding required by Federal and state laws:

Milan Mix	$2,169.15
Guy Bourdo	1,678.42

Respondents shall make payments on behalf of Milan Mix, Guy bourdo, and Percy Williams to the Milwaukee Area Truck Drivers Health and Welfare Fund, and the Central States, Southeast and Southwest Areas Pension Fund, in the amounts set forth below, plus lawful interest accrued to the date of payment:

	Health and Welfare Fund	*Pension Fund*
Milan Mix	$445.50	$519.00
Guy Bourdo	412.50	480.00
Percy Williams	100.65	118.95

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.